

**Bills Committee of the Legislative Council**

**Anti-Money Laundering and Counter Terrorist Financing (Financial Institutions) (Amendment)  
Bill 2017**

**Submission of The Hong Kong Association of Banks**

**4 October 2017**

**Introduction**

This paper sets out the views of The Hong Kong Association of Banks (“**HKAB**”) in relation to the proposed amendments to the Anti-Money Laundering and Counter Terrorist Financing (Financial Institutions) Ordinance (Cap 615 of the Laws of Hong Kong) (“**AMLO**”) (and relevant subsidiary legislation).

With the assistance of King & Wood Mallesons, we have examined the changes proposed in the Anti-Money Laundering and Counter Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 (“**Bill**”) and identified the areas of concern that we wish to raise with the Bills Committee of the Sixth Legislative Council of the Hong Kong Special Administrative Region of the People’s Republic of China (“**Bills Committee**”). These are set out in the “HKAB’s response” section of this written submission.

We would be pleased to engage in further discussions with the Bills Committee in relation to the proposed changes currently set out in the Bill as well as any other amendments to AMLO which may be proposed by the Administration to further enhance the effectiveness of the Hong Kong regime following ongoing dialogue between the industry and the regulatory authorities.

*Unless otherwise defined, terms used in this letter have the meaning given to them in the AMLO as applicable.*

**Executive summary**

HKAB strongly supports the amendments to the AMLO.

Having been in force since April 2012, HKAB agrees that there is a need to review the AMLO to ensure that it:

- (a) remains up-to-date and in line with practices set out in the Financial Action Task Force (“**FATF**”) Recommendations (“**FATF Recommendations**”); and
- (b) balances the risks of money laundering and terrorist financing (“**ML/TF**”) while ensuring it does not place an undue burden on financial institutions (“**Fis**”) and designated non-financial businesses and professions (“**DNFBPs**”).

This will assist in maintaining Hong Kong’s competitiveness as an international financial centre.

HKAB’s response can be summarised as follows:

- (a) amending the existing definition of “beneficial owner” for a trust to clarify requirements for multiple settlors of a trust;
- (b) adjusting the new information recording requirements for wire transfers to avoid ambiguity and align with the FATF Recommendations;
- (c) refining the new requirement in relation to the unique reference number of recipients of wire transfers;
- (d) further guidance in relation to the new definition of “customer”;

- (e) including regulatory bodies responsible for supervising lawyers and professional accountants in equivalent jurisdictions, to enable such lawyers and accountants to be eligible to act as specified intermediaries;
- (f) including related foreign trusts companies to act as specified intermediaries, similar to the new requirements for related foreign financial institutions; and
- (g) clarifying the application of section 22 of Schedule 2 to the AMLO and the requirements to implement group wide policies as they relate to FIs with DNFBP subsidiaries and vice versa.

Each of HKAB's requests have been benchmarked against the FATF Recommendations to ensure alignment with international practices.

### **Next steps**

Thank you very much for the opportunity to provide feedback on the proposed changes. We would be delighted to discuss any of these matters further with the Bills Committee.

## HKAB's response

Bill reference	AMLO schedule	AMLO part	AMLO section	Issue	Comment
1 -	Schedule 2	Part 1	1(1)	Definition of "beneficial owners" and settlor(s) of a trust	<p>In summary, we ask for a minor adjustment of the definition of "beneficial owner" in respect of trusts to cater for multiple settlors. The following paragraphs provide further details.</p> <p>1.1 The current definition of "beneficial owner" includes at section (c)(ii) "the settlor of the trust", which in practice captures all settlors of the trust. This is consistent with the FATF Recommendations, which uses the phrase "the settlor" throughout.<sup>1</sup> However the FATF Recommendations define "settlor" in its General Glossary as <i>"natural or legal persons who transfer ownership of their assets to trustees by means of a trust deed or similar arrangement."</i> This indicates that it is possible for "the settlor" to be multiple persons.</p> <p>1.2 In practice however, treating all settlors as "beneficial owners" irrespective of their contribution to the trust places an undue burden on FIs and DNFBPs without balancing the risks of ML/TF. HKAB asks the Bills Committee to consider amending section (c)(ii) as follows:</p> <p style="text-align: center;"><i>"the settlor of the trust, or where the trust has more than one settlor, any individual that contributes more than 25% of the capital of the trust property".</i></p> <p>1.3 This will ensure the appropriate individuals are treated as "beneficial owners" in circumstances where there are multiple settlors, rather than all individuals being treated as such irrespective of their contribution.</p> <p>1.4 Separately but also related, it would be helpful for the AMLO to define the term "settlor" as adapted from the FATF Recommendations definition as stated in paragraph 1.1 above.</p>

<sup>1</sup> For example at Interpretive notes to Recommendation 10, paragraph 5 (b)(ii)(i.i): *"Identify the beneficial owners of the customer and take reasonable measures to verify the identity of such persons, through the following information: (ii) For legal arrangements:(ii.i) Trusts - the identity of the settlor,..."*

Bill reference	AMLO schedule	AMLO part	AMLO section	Issue	Comment
2 <b>Part 2, clause 26 (77)</b>	Schedule 2	Part 2, Division 2	12(3)(c)	Information recording requirements for wire transfers	<p>In summary, we suggest a minor adjustment to this wire transfer provision for clarity, as set out as follows.</p> <p>2.1 The Bill seeks to repeal the phrase “<i>or, in the absence of an address</i>” from section 12(3)(c).</p> <p>2.2 HKAB asks the Bills Committee to consider retaining the word “or” from the above phrase, so that subsection 12(3)(c) reads:</p> <p style="text-align: center;"><i>“the originator’s address <b>or</b> the originator’s customer identification number or identification document number or, if the originator is an individual....”</i></p> <p>2.3 The inclusion of the word “or” will ensure that it is abundantly clear that FIs are only required to obtain either the originator’s address <b>or</b> identification or document number/date and place of birth, rather than all of the information stated in section 12(3)(c).</p> <p>2.4 Further, the addition of the word “or” is consistent with paragraph 6(c) of the FATF Interpretive Note to Recommendation 16.<sup>2</sup></p>

<sup>2</sup> Paragraph 6(c) of the FATF Interpretive Note to Recommendation 16 states: “Information accompanying all qualifying wire transfers should always contain:(c) the originator’s address, or national identity number, or customer identification number, or date and place of birth;”.

Bill reference	AMLO schedule	AMLO part	AMLO section	Issue	Comment
3 Part 2, clause 26 (77)	Schedule 2	Part 2	12(3)(e)	Unique reference number for wire transfers	<p>In summary, we ask for a pragmatic adjustment to the requirement for a unique reference number, to reflect the actual information that will be available to an ordering institution. The following paragraphs provide further details.</p> <p>3.1 The Bill inserts a new section 12(3)(e) which requires the ordering institution of a wire transfer to record: <i>“the number of the recipient’s account maintained with the beneficiary institution and to which the money for the wire transfer is paid or, in the absence of such an account, a unique reference number <b>assigned to the wire transfer by the beneficiary institution.</b>”</i> [our emphasis]</p> <p>3.2 In practice, the ordering institution might not have knowledge of the unique reference number assigned or to be assigned by the beneficiary institution at the time of accepting/processing the wire transfer request. Furthermore, the Interpretative note to FATF Recommendation 16 states at paragraph 7, <i>“In the absence of an account, a unique transaction reference number should be included which permits traceability of the transaction”</i>.</p> <p>3.3 On this basis, HKAB asks the Bills Committee to consider making the following changes to new section 12(3)(e):</p> <p><i>“the number of the recipient’s account maintained with the beneficiary institution and to which the money for the wire transfer is paid or, in the absence of such an account, a unique reference number <u>which permits traceability of the transaction assigned to the wire transfer by the beneficiary institution.</u>”</i></p> <p>3.4 In practice, the ordering institution may still record a unique reference number assigned to the wire transfer by the beneficiary institution if available or consider alternates that would permit traceability of the transaction.</p>

	Bill reference	AMLO schedule	AMLO part	AMLO section	Issue	Comment
4	Part 2, Clause 26(12)	Schedule 2	Part 1	1	Definition of "customer"	<p>In summary, we suggest that the current "customer" concept remain undefined in the AMLO to avoid uncertainty, with any explanations covered in subsidiary guidance. Our reasons are as follows.</p> <p>4.1 The Bill introduces the term "customer", which is defined to include a client. According to clause 20(c) of the Explanatory Memorandum, this was included "because it is more common to use the term "client" in relation to DNFBPs".</p> <p>4.2 We suggest that this may not be necessary, as the current AMLO covers Securities and Futures Commission ("SFC")-licensed and registered entities that also commonly use "client" because of the terminology used in the Securities and Futures Ordinance (Cap. 571) and SFC guidance. The concept has been adequately addressed in subsidiary guidelines to make this clear. We suggest that adding a definition into the AMLO only serves to add ambiguity, particularly if no further guidance is provided.</p>
5	-	Schedule 2	Part 2	18(3)(c)(iii)	Specified intermediary supervised by a regulatory body	<p>In summary, we ask that the AMLO recognise appropriate DNFBPs regulated in other jurisdictions, to align with the FATF Recommendations and facilitate more efficient compliance. Further details are set out as follows.</p> <p>5.1 The Bill inserts a new definition of "regulatory body" in Schedule 1 of the AMLO. Specifically it states:</p> <p><i>"regulatory body (監管機構), in relation to –</i></p> <p>(a) <i>an accounting professional – means the HKICPA;</i></p> <p>(b) <i>an estate agent – means the Estate Agents Authority; and</i></p> <p>(c) <i>a legal professional – means the Law Society;"</i></p> <p>5.2 The current section 18(3)(c)(iii) in Schedule 2 permits a lawyer, a notary public, an auditor, a professional accountant, a trust or company service provider or a tax advisor practising in an equivalent jurisdiction (and others) to act as specified intermediary provided (amongst other requirements) that the relevant person is supervised for compliance with AML/CTF requirements "by an authority in that jurisdiction that performs functions similar to those of any of the <b>relevant authorities</b>". [our emphasis]</p> <p>5.3 However, the definition of "relevant authority" in Schedule 1 of the AMLO is quite narrow and does not capture the regulatory bodies that oversee a professional</p>

Bill reference	AMLO schedule	AMLO part	AMLO section	Issue	Comment
					<p>accountant, an estate agent or a lawyer in other jurisdictions. Specifically it states:</p> <p><i>“(a) in relation to an authorized institution or SVF licensee, means the Monetary Authority; (Amended 18 of 2015 s. 71);</i></p> <p><i>(b) in relation to a licensed corporation, means the Securities and Futures Commission;</i></p> <p><i>(c) in relation to an authorized insurer, appointed insurance agent or authorized insurance broker, means the Insurance Authority; and</i></p> <p><i>(d) in relation to a licensed money service operator or to the Postmaster General, means the Commissioner;”</i></p> <p>5.4 HKAB asks the Bills Committee to consider amending section 18(3)(c)(iii) as follows:</p> <p><i>“...is supervised for compliance with those requirements by an authority in that jurisdiction that performs functions similar to those of any of the relevant authorities or regulatory bodies”.</i></p> <p>5.5 This would capture lawyers and professional accountants and permit those persons to qualify as a specified intermediary for the purposes of section 18(3). The use of “regulatory bodies” in this context would <b>not</b> have the unintended effect of capturing estate agents as a specific intermediary as they are not one of the parties listed in the introductory language of section 18(3)(c).</p> <p>5.6 We stress that FATF Recommendation 17 and the Interpretative Note to Recommendation 17 specifically contemplate that DNFBPs <i>“that are supervised or monitored and that meet the requirements under Recommendation 17”</i><sup>3</sup> may act as intermediaries provided they are supervised or monitored. Therefore HKAB’s request is consistent with FATF’s position.</p>

<sup>3</sup> See paragraph 3 of Interpretative Note to Recommendation 17.

	Bill reference	AMLO schedule	AMLO part	AMLO section	Issue	Comment
6	Part 2, Clause 26 (103)	Schedule 2	Part 2	18(3)(d) and (7)	Definition of “related foreign financial institution” does not capture related foreign trust companies	<p>In summary, we ask that related foreign trust companies also be permitted to be taken into account as specified intermediaries in appropriate circumstances, which is consistent with FATF expectations. Our reasons are as follows.</p> <p>6.1 The Bill implements at section 18(3)(d) provision of a “related foreign financial institution” to act as a specified intermediary. The definition of “related foreign financial institution” is inserted at section 18(7).</p> <p>6.2 HKAB asks the Bills Committee to consider extending the definition of related foreign financial institution (or inserting a standalone separate definition) to capture related foreign trust companies of the financial institution subject to the same conditions in:</p> <ul style="list-style-type: none"> <li>(a) section 18(3A) in relation AML/CTF measures in place and supervision for compliance (that is the same conditions that apply to related foreign financial institutions);</li> <li>(b) section 18(7) in the definition of “related foreign financial institutions” in relation to its corporate link with the financial institution; and</li> <li>(c) section 18(4)(c) in relation to reasonable measures to be undertaken to mitigate risk of ML/TF where the intermediary is a related foreign financial institutions.</li> </ul> <p>6.3 This ensures that financial institutions with group members that are trust companies are able to rely on those group members as specified intermediaries. This is also consistent with FATF Recommendation 17, which contemplates when “<i>a financial institution relies on a <b>third party</b> that is part of the same financial group</i>”. The Interpretative Note to Recommendation 17 clarifies that “[t]he term <i>third parties</i> means financial institutions or DNFBPs that are supervised or monitored and that meet the requirements under Recommendation 17.” Therefore, the FATF Recommendations do not exclude the possibility that an FI may rely on a group member that is a DNFBP and that meets the requisite criteria.</p>



	Bill reference	AMLO schedule	AMLO part	AMLO section	Issue	Comment
7	Part 2, Clause 26(116)	Schedule 2	Part 4	22	DNFBP subsidiary of an FI	<p>In summary, we ask for clarification as to the application of section 22 of Schedule 2 to the AMLO, as outlined as follows.</p> <p>7.1 HKAB understands that section 22 of Schedule 2 to the AMLO, as amended by the Bill, applies to Hong Kong incorporated:</p> <ul style="list-style-type: none"> <li>(a) FIs and their branches or subsidiary undertakings that conduct business as an FI; and</li> <li>(b) DNFBPs and their branches or subsidiary undertakings that conduct business as a DNFBP.</li> </ul> <p>7.2 Based on the proposed drafting, HKAB further understands that section 22 of Schedule 2 to the AMLO will not apply to the branch or subsidiary undertaking of a Hong Kong incorporated FI that conducts business as a DNFBP (and vice versa)</p> <p>7.3 HKAB notes that the FATF Recommendations does not specifically address this “crossover” query. Rather Recommendation 18 (and its Interpretative Note) relates to FIs and “<i>their foreign branches and majority-owned subsidiaries</i>” and Recommendation 23 applies Recommendation 18 to DNFBPs without further guidance or qualification.</p> <p>7.4 HKAB suggests that the proposed amendments of section 22 be re-drafted if this is not the legislative intention.</p>